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No. 205

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

CHARLES EDWARD ROSS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF FOR RESPONDENT
In Opposition to the Petition for Writ of Certiorari

C. PEMBROKE PETTIT
Commonwealth's Attorney for
Louisa County, Virginia

RENO S. HARP, III
Assistant Attorney General
Supreme Court–State Library Building
Richmond, Virginia 23219

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COMMONWEALTH OF VIRGINIA,

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PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated October 10, 1967, the Attorney General of Virginia was requested to file a response to the petition for writ of certiorari in the instant case.* By letter of the Honorable Robert Y. Button, Attorney General of Virginia, dated October 12, 1967, the Clerk of this Court was advised that the response to the petition in question would be prepared by C. Pembroke Pettit, Esq., Commonwealth's Attorney for Louisa County, Virginia. The said Commonwealth's Attorney, by letter of November 7, 1967 to the Clerk of this Court, requested an extension of 15 days plus such time as would be required

* Post, Appendix A.

for printing.* In response to this, the Clerk of this Court extended the dead line for filing of brief in opposition to November 25, 1967 and a photo copy of that letter was duly forwarded to Roland P. Ealey, Esq., Counsel for Petitioner.† In accordance with the above, the within brief of the response in opposition to the petition for writ of certiorari is filed.

PRIOR PROCEEDINGS

On July 19, 1966, petitioner was found guilty by a jury in the Circuit Court of Louisa County of murder in the second degree, and his punishment was fixed at eighteen years confinement in the State Penitentiary of Virginia. His motion to set aside the verdict was overruled and judgment was entered on the verdict on July 19, 1966. A petition for writ of error to the judgment of conviction was denied by the Supreme Court of Appeals of Virginia on March 7, 1967. The case is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia, filed in the Supreme Court of the United States by the petitioner on May 29, 1967.

STATEMENT OF FACTS

On May 1, 1966, early in the morning (or about midnight on April 30, 1966), petitioner and three male companions drove to Zion's Cross Roads in Louisa County, Virginia to purchase some food. Petitioner's companions entered the "Green Circle" Restaurant and petitioner went diagonally across Highway No. 250 to the Crescent Inn, also a restaurant, where he had previously worked. The deceased, Roger Clatterbuck along with a male companion, Lawrence

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* Post, Appendix B.
† Post, Appendix C.

Robert Bond, and two female companions entered the Crescent Inn shortly thereafter and took seats in a booth in the front part of the restaurant which part had large glass windows. Shortly thereafter, the deceased and Bond were attracted by what appeared to them to be an altercation between several people outside the restaurant and went to investigate. Petitioner left the restaurant just ahead of them and the deceased and Bond soon thereafter pursued him, they being some distance behind. That petitioner either fell or was thrown to the ground by someone is not denied but the evidence is in conflict as to who may have caused his fall and the jury has resolved that conflict. Petitioner got back to his feet and ran ahead of those pursuing him, turned and fired a pistol at the deceased who was hit by the bullet, a 22 cal., from which he died almost instantly. There were flood lights in the area and the evidence discloses without conflict that the lethal weapon was a small one with a "shiny" barrel. After the firing, petitioner and his companions left the scene on foot, leaving their car at the scene. Later that night, Harry H. Young, a Deputy Sheriff of Louisa County, who had been ordered to keep surveillance upon the car in which petitioner had been riding, saw petitioner and one of his companions approach and enter the car and immediately took them into possession. The pistol, ownership of which petitioner readily admitted during the trial and having a "shiny" barrel, was found on his person. He and all of his companions were then taken to the Louisa County Sheriff's Office and the father of one of them was called and also appeared at the Sheriff's Office. Petitioner then, after having been carefully advised of his constitutional rights by both Sheriff Henry A. Kennon and Deputy Sheriff Harry H. Young, repeatedly stated that he understood his rights, that he did not want a lawyer

and that he wanted to tell the truth and then voluntarily made a statement which was used against him in the trial.

QUESTIONS PRESENTED

1. Whether petitioner's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States were infringed by his conviction and sentence on a charge of murder by the *nisi prius* court under the evidence and the failure of said Court to strike the prosecution's evidence and dismiss the charge against him.

2. Whether petitioner's rights under the privilege against self-incrimination and the right to be adequately warned prior to questioning that he had a right to remain silent and that any statement he made might be used against him and that he had the right to the presence of an attorney, either retained or appointed; and whether or not there was a clear, intelligent waiver of these rights so as to make them binding against him under the provisions of the Fifth and Sixth Amendments to the Constitution of the United States.

ARGUMENT I

After the verdict of guilty was rendered by the jury and reported to the Court and the jury discharged, counsel for defendant moved that the verdict of the jury be set aside as contrary to the law and evidence, arguing that the verdict was contrary to the facts as they were produced and also as read to the jury by the Court. At this point, the Court stated as follows: "Mr. Ealey, this matter is now fresh in the mind of the Court, and I feel that additional time would not be of any real assistance to the Court in this regard. The Court feels that the jury and its verdict was

proper, and the Court will have to overrule your motion," to which action of the Court, counsel for petitioner duly excepted. (Tr., p. 140).

Any inconsistencies in the evidence have been resolved by the jury upon the evidence adduced and with proper instructions and their decision should not now be disturbed.

When the sufficiency of the evidence is challenged after conviction, this Court will view it in the light most favorable to the Commonwealth, granting all reasonable inferences fairly deductible therefrom and judgment of the Trial Court will not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it. *Virginia Code, Section 8-491. Crisman* v. *Com.*, 197 Va. 17, 87 S.E. (2nd) 796; *Toler* v. *Com.*, 188 Va. 774, 51 S.E. (2nd) 210; *Wright* v. *Com.*, 196 Va. 132, 82 S.E. (2nd) 603.

All evidence in this case is conclusive and without denial that petitioner had previously purchased the weapon which caused the death of decedent; that he had it in his possession; that if he had been in combat with another, he was free and running clear of any combatant; that he fired his weapon at the deceased who was hit by the bullet and died from the wound.

It is well settled that questions of fact in a trial are to be resolved by the jury (if there is a jury as in this case) and that the jury becomes the fact finding body. The jury weighs all the evidence and draws all inferences to be drawn therefrom, judges the credibility of the witnesses, receives expert testimony and draws ultimate conclusions as to the facts. Indeed, the very essence of the functions of the jury in this and similar cases is to secure from concluding instances that which the jury considers most reasonable. *Burrell* v. *Burrell*, 193 Va. 194.

And the inferences to be drawn from the proven facts are within the province of the jury, so long as the inferences are reasonable and justified. *LaPrade* v. *Com.*, 191 Va. 410, 61 S.E. (2nd) 313.

Verdicts approved by the Trial Court are entitled to more weight than if they had been set aside by that Court. Unless it appears from the evidence that such a judgment is plainly wrong or without evidence to support it, the judgment of the Trial Court shall not be set aside. *Richardson* v. *Lovvorne*, 199 Va. 688, 101 S.E. (2nd) 514.

ARGUMENT II

Petitioner's claim that his constitutional rights were violated by the admission of his statement or confession made to the Sheriff while in custody out of the presence of counsel and not advised by counsel, is without merit.

Petitioner, when arrested, was cooperative and his companions were brought to the Sheriff's Office with him, together with one parent of one of the companions. He expressed his original desire to "tell the truth," he was not held incommunicado and was not questioned for any long period of time. He was advised by the Sheriff and also by the Deputy Sheriff that he had a right to remain silent, that he had the right to assistance of a lawyer and if he could not obtain a lawyer, they would see that one was furnished for him, that anything he did say to the officers could be used in the Court of Law against him. In addition, he was offered no favor nor was he put in any fear. His reply to each officer was that he did not want a lawyer but he wanted to tell the truth. He was in custody but no warrant had been issued or asked for.

At the trial of the case, the Trial Judge, out of the presence of the jury, caused the Sheriff to be examined and cross-examined as well as Deputy Young, they each testified

that petitioner had been advised he did not have to make any statement and any statements he did make could be used against him; that neither favor nor harsh treatment were promised him; that he had a right to counsel and if he did not have funds to employ counsel, they would see that he did get counsel. In a response to a question from the Judge, the Sheriff testified that there was no question in his mind but that petitioner understood what he had explained to him about his rights to counsel and about his rights to remain silent.

The Court also heard testimony of petitioner out of the presence of the jury regarding this phase of the investigation and after mature consideration, stated as follows: "The only way you can determine whether a person understands something is to observe him at the time and we had the Sheriff and Deputy Sheriff who testified he did understand at the time and the Court is going to permit this statement, made, after being advised of his constitutional rights, to be admitted in evidence." (Tr., p. 61, 11. 310).

Respondent, therefore, submits that the Court did not err in admitting the statement but even if there could have been error which the Commonwealth does not admit, the error was cured by petitioner's action in subsequently testifying in his own behalf. No where in the record does he claim that he testified in open Court under any pressure which might have been caused by his previous admission to the officers.

Respondent, therefore, submits that the confession was voluntarily and understandingly made.

Respondent further submits that the requirements laid down in *Miranda* v. *Arizona,* 384 U. S. 436 were fully and amply made by the officers and even the requirements laid down in *Escobedo* v. *Illinois,* 378 U. S. 478 were complied with although the facts in this case are entirely different,

principally because petitioner in this case was not questioned involuntarily and had stated that he did not want a lawyer.

CONCLUSION

For the foregoing reasons, Counsel for the Commonwealth submits that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

C. PEMBROKE PETTIT
Commonwealth's Attorney
Louisa County, Virginia

RENO S. HARP, III
Assistant Attorney General
Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE

I, Reno Sharp, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of Counsel for Respondent in the above captioned matter, hereby certify that a copy of this Brief for Respondent in opposition to the petition for Writ of Certiorari has been served upon counsel of record for Petitioner by depositing the same in the United States Post Office, with First Class postage prepaid, this 25th day of November, 1967, pursuant to the provisions of Rule 33 (1) of the Rules of the Supreme Court of the United States as follows: Roland D. Ealey, Esq., 420 North First Street, Richmond, Virginia 23219, Counsel for Petitioner.

RENO S. HARP, III
Assistant Attorney General

Appendix A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

October 10, 1967

The Honorable Robert Y. Button
Attorney General of Virginia
Supreme Court of Appeals Building
Richmond, Virginia 23219

Re: Charles Edward Ross v. Virginia
No. 205, October Term, 1967

Dear Sir:

A Petition for a writ of certiorari was filed in this Court on May 29, 1967, in the above-entitled case. My records indicate that you were served with a copy of the petition.

I have been directed by the Court to request that you file a response to the petition. Forty printed copies of your response, with service, should reach this office on or before November 10, 1967.

Very truly yours,

JOHN F. DAVIS, Clerk

By /s/ E. P. Cullinan
E. P. Cullinan
Chief Deputy

JMH
cc: Roland D. Ealey, Esq.
420 North First Street
Richmond, Virginia 23219

Appendix B

November 7, 1967

Honorable John F. Davis, Clerk
Supreme Court of the United States
Washington, D. C. 20543

Re: Charles Edward Ross

v.

Virginia

No. 205, October Term, 1967

Dear Mr. Davis:

Reference is made to your request to the Attorney General of Virginia dated October 10, 1967, for filing of response to petition for writ of certiorari which was filed in your Court on May 29, 1967.

The Attorney General directed me by letter of October 12, 1967 to file the response but as of that date, I had not received a copy of the petition and Mr. McIwaine, Assistant Attorney General of Virginia, advised me by telephone that he did not have a copy.

In view of the above situation, I called Mr. Ealey at Richmond and on that date he was tied up and could not get a copy in the mail to me but he did, in a couple of days, send me a copy.

At that time, my calendar was pretty well filled up for the period and I advised Mr. McIlwaine that I would do my very best to comply with the dead line for filing but probably would have to ask for an extension. I did find it necessary to apply for an extension and so advised Mr. McIlwaine by telephone. I am today in receipt of letter from him stating that he has communicated with Mr.

Schade of your office who advised him that you would like to have a letter from me stating the circumstances. In addition, I have contacted Mr. Ealey again and he agrees that it is not unreasonable and he will not object to a 15 day extension plus such time as is required for printing and I am sure Mr. McIlwaine can get the printing done without much delay.

In view of the above, I request an extension of 15 days from November 10, 1967 plus printing time for filing of brief in opposition to the writ filed.

Respectfully yours,

/s/ C. Pembroke Pettit
Commonwealth's Attorney

CPP:pah

cc: Honorable Robert Y. Button
Attorney General of Virginia
Supreme Court of Appeals Building
Richmond, Virginia 23219

Roland D. Ealey, Esq.
420 North First Street
Richmond, Virginia 23219

Appendix C

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

November 8, 1967

C. Pembroke Pettit, Esq.
Commonwealth's Attorney
Louisa, Virginia

Re: Ross v. Virginia

No. 205, October Term, 1967

Dear Mr. Pettit:

Your motion for an extension of time to file a response to the petition for a writ of certiorari in the above-entitled case has been granted, and the time has been extended to and including November 25, 1967.

You should advise your adversary of the granting of this motion.

Very truly yours,

JOHN F. DAVIS, Clerk

By /s/ E. P. Cullinan
E. P. Cullinan
Chief Deputy

EPC:jmh

Photo copy to Roland D. Ealey, Esq., 420 N. First Street, Richmond, Virginia 23219 this 9th day of November, 1967.

/s/ C. Pembroke Pettit
Commonwealth's Atty.
Louisa County, Virginia